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No. 80-523

In the Supreme Court of the United States

OCTOBER TERM, 1980

**IN THE MATTER OF CARL M. WALSH,
A WITNESS BEFORE THE SPECIAL
SEPTEMBER 1978 GRAND JURY**

APPEAL OF: UNITED STATES OF AMERICA,
Respondent,

vs.

CARL M. WALSH,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court may establish *ad hoc* procedures to insure the confidentiality of privileged communication between client and lawyer when the lawyer has been subpoenaed to appear before the grand jury investigating his client?

2. Can the attorney-client privilege and work product doctrine protect more than the mere communications between the client and the lawyer?

3. Can the attorney-client relationship be established in judicial proceeding prior to the attorney's compelled appearance before a grand jury investigating his client?

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in the appendix to the Petition (Appendix "B"). The opinion was entered on May 19, 1980. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by order entered July 31, 1980 (Appendix "C").

The opinion of the United States District Court which is the judgment originally appealed from was entered

October 11, 1979, and is also printed in the appendix to this Petition (Appendix "A"). The District Court's order of July 24, 1979 which is referred to in the October 11, 1979 order is also set out in the appendix (Appendix "A1").

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1980 (Appendix "B"). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 31, 1980 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to United States Constitution
Fifth Amendment to United States Constitution
Sixth Amendment to United States Constitution

STATEMENT OF THE CASE

On or about May 24, 1979, Carl Walsh was served with two Subpoenas (copies of which are attached to this Brief as Appendix "E" and "F"). The Subpoenas called for his appearance before the Special September 1978 Grand Jury in Grand Jury investigation No. 77 GJ 2144 to give testimony and produce various "writings, records, documents, correspondence, memorandum, contracts and notes" in addition to obtaining his "fingerprints, palmprints, photograph". (R. 6)

Mr. Walsh was and is representing five members of the Anthony Accardo family and an Accardo family employee before that same Grand Jury in the *same* investigation. Mr. Walsh consulted privately and confidentially with each

of his clients concerning his or her appearance before the Grand Jury. (R. 6)

Mr. Walsh filed a Motion to Quash Grand Jury Subpoenas and the government filed three petitions—Petition for An Order Directing Carl M. Walsh To Comply With The Grand Jury Subpoena Duces Tecum, Petition For An Order Directing Carl M. Walsh To Comply With The Grand Jury Subpoena To Obtain Fingerprints, Palmprints And Photograph Exemplars, Petition For An Order Directing Carl M. Walsh To Comply With The Grand Jury Subpoena. The Court then heard arguments on the motion and the petitions on June 27, 1979. During this argument, the government, after questioning by the Court, modified the subpoena requesting the palmprints, fingerprints and photograph, eliminating those requests. (July 27, 1979, Tr. 39-42). A briefing schedule was set and each of the parties filed briefs and the matter was set for July 9, 1979.

On July 9, 1979, the Court, having read the Briefs and having heard from counsel denied the Motion to Quash and ordered Mr. Walsh to appear before the Grand Jury on July 11, 1979, at 10:00 a.m. pursuant to the Subpoenas (R. 7 and July 9, 1979, Tr. 9-16).[1]

On July 11, 1979, Mr. Walsh presented himself in the Grand Jury witness room with his attorneys, Michael B. Nash and William J. Linklater, and refused to appear before the Grand Jury. The government then filed a Mo-

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[1] During this session, it was made clear neither the government nor the Grand Jury had ever asked or demanded Mr. Volpe return to the Grand Jury. It is also clear, absent the *in camera* material, the government did not attempt to establish Mr. Volpe was missing or murdered, facts which neither Mr. Walsh or his counsel agree are true. (Aug. 6, 1979, Tr. p. 9; July 13, 1979, Tr. 10-11; July 9, 1979, Tr. 2-7, 22, 23, 33; July 13, 1979, Tr. 2).

tion for Rule to Show Cause Why Carl M. Walsh Should Not Be Held For Contempt Of Court For Failure To Comply With The Order Of This Court and a Bill of Particulars. (R. 10 and 11) After determining from Walsh's counsel that the facts in the Motion and Bill were accurate and complete, the Court issued the Rule and the Bill of Particulars. (July 11, 1979, Tr. 3 and R. 13). The matter was set for hearing on Tuesday, the 13th of July, 1979. The Court allowed Mr. Walsh until the next day to file a response "why he should not be held in contempt".

On July 13, 1979, after determining from the parties there was nothing to be added, the Court continued the hearing to give the government an opportunity to provide the Court with facts to show the subpoenaed material does not fall within the privilege. The government was given one week to file the material in camera with the Court and the matter was set for further hearing on July 24, 1979, at 10:00 a.m.

On July 24, 1979, the District Court formalized its suggestions made at the July 13, 1979 hearing. The Memorandum Opinion and Order issued by the judge reviewed the facts and law applicable to date, and giving the government an opportunity to submit facts "to convince" the Court to grant the Rule to Show Cause. (July 24, 1979, Tr. 24). The government submitted a list of proposed questions to be asked Mr. Walsh and a "lengthy affidavit" with "attached exhibits". The government attorneys noted these facts, not within the rule and Bill of Particulars, were presented to the District Court to persuade it to grant the Rule to Show Cause and hold Mr. Walsh in contempt. (July 24, 1979 Tr. 13-24). The government did not appeal the Memorandum Opinion and Order or file a mandamus action in this court. The hearing was continued to July 31, 1979 in order for the District Court to review the materials submitted by the government.

On July 31, 1979, the matter was continued to August 3, 1979, and then again to August 6, 1979. In the meantime, Mr. Walsh and his counsel were provided copies of the proposed questions. (Appendix D) On August 6, 1979, the Court heard additional arguments regarding the Rule. The Court noted it had read and considered the matters submitted to it by the government (August 6, 1979, Tr. 2, 7 and 8).

The witnesses' argument was directed essentially to the list of proposed questions since the "lengthy affidavit" and "attached exhibits" were not available to him. However, the government in its argument addressed itself to the list of proposed questions and continually made reference to the facts contained in the "in camera affidavit".

The Court then took the matter under advisement. As specifically noted by the Court, the Court considered the affidavits and attached exhibits submitted in camera by the government, and denied the petition for a rule to show cause. (See Memorandum Opinion and Order dated October 11, 1979, p. 17, Petitioner's Appendix "A").

On May 19, 1980, the United States Court of Appeals for the Seventh Circuit issued its opinion reversing the District Court. (Appendix B) A timely Petition for Rehearing and Suggestions for Rehearing En Banc was filed and denied by order entered on July 31, 1980. (Appendix C)

REASONS FOR GRANTING WRIT

Petitioner submits that the decision of the Seventh Circuit Court of Appeals was incorrect in reversing the procedures set out by the District Court to insure the protection of privileged communications between lawyer and client and the preservation of the lawyer-client relationship in the unique factual situation existing in this case. The decision is contrary to that reached by the Sixth Circuit Court of Appeals in *In Re Grand Jury Subpoena Dated November 8, 1979,* 622 F.2d 933 (6th Cir., 1980). Also, this court will consider a similar issue involving the attorney-client privilege and Work Product Doctrine this Fall. *The Upjohn Co., et al.* v. *United States, et al.,* 600 F.2d (6th Cir., 1979), cert. granted ..... U.S. ..... (case No. 79-886)). The court's decision fails to evaluate, discuss or acknowledge *the effect* of calling a lawyer before the grand jury which is investigating his client. The court's opinion further ignores the fact that this practice permits the government by its unilateral action to create a conflict of interest between the client and the lawyer whom he retained to represent him in the investigation.

ARGUMENT

Not until the last paragraph of the Opinion does the Court make any reference to the inherent dangers of an attorney testifying before a grand jury which is investigating his client. Although the Court states it is cognizant of dangers, it did not discuss them. In fact, the Court of Appeals fails to recognize in its Opinion the fact that attorney Walsh is subpoenaed to appear before the same grand jury which has targeted his client in the same in-

vestigation. The Opinion also fails to acknowledge that Walsh's client was served with a subpoena and relied on his Fifth Amendment rights. The Court's Opinion does not mention or discuss the very important concerns to which the numerous authorities have addressed themselves. (Opinion, p. 8, 9). Those cases, as well as the District Court's Opinion, recognize that an analysis of the attorney-client privilege cannot, by its very nature, be limited to merely the communication of the client to the attorney, but like any privilege, it must be examined in terms of the function to be protected. *Imbler* v. *Pachtman,* 424 U.S. 409, 47 L.Ed.2d 681 (1966); *United States* v. *Johnson,* 383 U.S. 169, 15 L.Ed.2d 681 (1966); *United States* v. *Brewster,* 408 U.S. 501, 33 L.Ed.2d 507 (1972); *Gravel* v. *United States,* 408 U.S. 606, 33 L.Ed.2d 583 (1972); *Tenney* v. *Brandhove,* 341 U.S. 367, 71 S.Ct. 783 (1951); *Stump* v. *Sparkman,* 435 U.S. 349 (1978). The function to be protected here is the right of the client to seek and receive counsel free from judicial or governmental intrusion. *In Re Grand Jury Subpoena Dated November 8, 1980,* 622 F.2d 933 (1980); *In Re Grand Jury Proceedings (Duffey),* 473 F.2d 840, 842 (8th Cir., 1972); *In Re January 1976 Grand Jury (Gensen),* 534 F.2d 719 (7th Cir., 1976).

An important point which must be understood if this case is to be properly decided is that it is virtually impossible to separate the existence of the privilege from the fact of the attorney-client relationship. Neither can be examined without reference to the other. Indeed, the Seventh Circuit's opinion points out that the privilege cannot be determined without examining the relationship. Thus, when determining the extent of the privilege one must look to the relationship as a whole and examine the extent of the privilege in light of that relationship and the function to be protected.

The District Court in this case attempted to shape its opinion to recognize the privilege and constitutional right while at the same time recognizing the grand jury's right to "everyman's evidence". In doing so, the District Court merely recognized Walsh was not everyman, but a lawyer representing a target of the grand jury's investigation in that investigation. The Courts in *In Re Terkeltaub,* 256 F.Supp. 683 (S.D.N.Y., 1966) and *In Re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943 (E.D. Pa., 1976) acted in the same manner. Both cases recognize that the situations presented in those cases necessitate a ruling which protects the function—which is the seeking of legal advice.

The Sixth Circuit was recently faced with a similar situation in *In Re Grand Jury Subpoena Dated November 8, 1979,* 622 F.2d 933 (1980). In that case, the clients' attorney was subpoenaed before a grand jury investigating improprieties relating to a previous Food and Drug Administration investigation. Many of the questions asked of the attorney in that case are similar to the questions which the government propose to ask Walsh in this case. The Sixth Circuit reacted in the same way the District Court did in this case. Applying the same principles enunciated by the District Court in its opinion, the Sixth Circuit stated:

> ". . . we conclude that the grand jury's questions viewed as a whole delved into areas protected by the work product privilege." *In Re Grand Jury Subpoena Dated November 8, 1980,* 622 F.2d 933 (1980).

The Sixth Circuit went on to point out that

> "The questions . . . 'would yield substantially probative links in an existing chain of inculpatory events or transactions and could drastically diminish the value of legal discussions or planning that took place

previously' . . . *In Re Grand Jury Proceedings Jones*, 517 F.2d 666, 674 (5th Cir., 1975)."

Beginning with Mr. Justice Jackson's comments in *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947), a work product doctrine case, to the more recent cases courts have recognized the need to fashion remedies which balance competing interests.

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper [preparation] of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Hickman* v. *Taylor*, 329 U.S. 495, 510-511, 67 S.Ct. 385, 393 (1947).

This is a criminal case. The protection of the privilege must be measured by the Constitution, and specifically the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to the assistance of counsel. The subpoenas, if blindly enforced, will emasculate both those guarantees. The United States Supreme Court in *Fisher* v. *United States*, 425 U.S. 391, 403 (1976) recognized the concern involved and stated:

> "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys, 8 Wigmore, §2291, and §2306, p. 590; McCormick, §87, p. 175, §92, p. 192; *Baird* v. *Koerner*, 279 F.2d 623 (CA 9, 1960); *Modern Woodmen of America* v. *Watkins*,

> 132 F.2d 352 (CA 5, 1942); *Pritchard* v. *United States*, 181 F.2d 326 (CA 6 aff'd per curiam, 399 U.S. 974, 94 L.Ed. 1380, 70 S.Ct. 1029 (1950); *Schwimmer* v. *United States*, 232 F.2d 855 (CA 8, 1956); *United States* v. *Goldfarb*, 328 F.2d 280 (CA 6, 1964). As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."

A lack of understanding regarding the issue presented in this case is evidenced by the statement in the Opinion on page 9, "We presume that Walsh is competent to protect his client's confidential interests before the grand jury. *United States* v. *Wolfson*, 558 F.2d 59, 66 (2nd Cir., 1977)". This presumption is, by any yardstick, completely wrong. First, an attorney cannot, in the capacity of witness against his client, maintain the needed objectivity. Secondly, in the circumstances of this case, the client has a reasonable apprehension about the attorney's competency when the attorney is to be a witness against him. Thirdly, *Wolfson* presented a very different factual situation from this case. The *Wolfson* decision involved the appeal of a "voluminous coram nobis petition". The court in *Wolfson* noted the attorney and his client had acquiesced in the attorney's appearance before the grand jury and presumed from this fact that the client and his attorney had determined the attorney competent to protect his client's interest in the grand jury. In fact, in *Wolfson* the argument concerning the attorney's appearance before the grand jury was never even made in the District Court, much less in a proceeding to quash or modify the subpoena prior to the lawyer's appearance. In the circumstances of this case, the attorney-witness immediately brought the matter to the attention of the District Court.

Notwithstanding the above, the court in *Wolfson* noted that "grave dangers (are) posed when counsel appears before the same grand jury" and recognized "that the potential disclosures touch upon a vital center in the administration of criminal justice". *United States* v. *Wolfson*, 558 F.2d 59, 65 (2nd Cir., 1977). In *In Re Terkeltaub*, 256 F.Supp. 683 (S.D.N.Y., 1966) cited by the *Wolfson* court, the court stated:

> "And so we start here with a demand that is troublesome on its face—a demand that a lawyer be forced to testify about his work in supposed defense of a client. Our problem is not solved, but it is affected, by a recognition that this sort of procedure must have at least a slightly chilling impact upon counsel for defendants in criminal cases. Again, this has nothing to do with whether lawyers for their own sakes should be treated better or worse than other people. It has to do with how the public may fare depending on the course followed with applications like the one before us." *Id.* at 685.

In *In Re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945 (E.D. Pa., 1976), also cited by the *Wolfson* court, that court stated:

> "We observe preliminarily that we are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client, especially where the government does not have good grounds for belief that the lawyer possesses unprivileged, relevant evidence that cannot be obtained elsewhere . . . . The practice permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification. *The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus*

impair or at least impinge upon the attorney-client relationship." (emphasis supplied).

See also *United States* v. *Colacurcio*, 499 F.2d 1401 (9th Cir., 1974).

Reasoning similar to that expressed in *In Re Terkeltaub* and *Sturgis* was used in *Matter of Rosenbaum*, 401 F.Supp. 807 (S.D.N.Y., 1975) and *In Re Stolar*, 397 F.Supp. 520 (S.D.N.Y., 1975). In *Matter of Rosenbaum*, the court cited *Terkeltaub* and ruled an attorney could not be forced to testify against his *former* client regarding phone conversation *with a witness* made in preparation for trial. In *In Re Stolar*, the court heard the matter on the attorney's motion to quash and ruled the attorney need not appear and assert the privilege. The court stated:

> "The general purpose of this privilege is 'to promote freedom of consultation of legal advisers by clients (citations omitted). To this end the client must be assured that information conveyed in confidence to the attorney will not be ordinarily disclosed. Arrayed against this consideration is the public interest in obtaining disclosure of every man's evidence (citations omitted). When these two principles clash a balance must be struck and an appropriate resolution will not be forthcoming by a *wooden application of some general formula. The answer may lie, instead, in an analysis of the particular circumstances* giving rise to the problem, ever mindful of the policy considerations which furnish a basis for the two principles." (emphasis added). *In Re Stolar*, 397 F.Supp. 520, 524 (S.D.N.Y., 1975).

The American Bar Association Standards for Criminal Justice express the same thoughts. The *Standards Relating To The Prosecution Function* provides in pertinent part at Section 3.6(e) that:

> "The prosecutor *should not compel* the appearance of a witness whose activities are the subject of the

> inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify." (emphasis added).

The Commentary on Standard 3.6 provides:

> "It would dilute and impinge upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and there claim the privilege when the prosecutor has been told in advance that the witness would do so. Such a tactic is *unfair* in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury." (emphasis added).

In the instant cause, the government is attempting to call an attorney for a putative defendant before the grand jury knowing that he will assert the attorney-client privilege and thus in essence, at least in the context of this case, assert his client's Fifth Amendment rights. This is not to say Walsh has the right not to testify before the grand jury merely because he is an attorney, but that caution should be exercised in a case with these unusual facts.

A great deal of the Court's Opinion deals with Walsh's burden to establish the privilege (Opinion, p. 5-7). The Opinion states "Walsh must take the stand" and "must establish the elements of the privilege" as a witness in the grand jury room. Given the sensitive nature of the relationship and the recognized problems involved, such a procedure for establishing the privilege is patently wrong. There is no reason the existence of the relationship should not be established in an adversary proceeding before the court where the client can be represented by someone other than the witness-attorney rather than in the secrecy of the grand jury room. It is not the grand jury or the government which will rule on the lawfulness of the assertion, but the court.

Walsh does not, and did not, dispute that he has the burden to prove the existence of the privilege. Except for the fact the government conceded the existence of the relationship in the District Court, Walsh contemplated a hearing wherein he would have shouldered the burden. (Tr. 6/27/79, p. 6-7). He did and does argue the futility of having to appear before the grand jury to do the inevitable. This is especially so in the circumstances of this case. However, the necessity of such a hearing was and is moot since the government acknowledged the existence of the relationship.

Neither Walsh nor the Court suggested the relationship creates "a cloak of protection [which is] draped around all occurrences and conversations which may have any bearing . . . upon the relationship of the attorney with his client" citing *United States* v. *Goldfarb,* 328 F.2d 280, 281-82 (6th Cir.), Cert. Denied 377 U.S. 976 (1964). An important distinction between this case and *Goldfarb* is that Walsh, unlike Goldfarb, represented the target of the investigation and more importantly represented him in this particular investigation. Even the *Goldfarb* court noted the necessity of the client's "assurance that there will be no disclosure". *United States* v. *Goldfarb,* 328 F.2d 280, 282 (6th Cir., 1964) Cert. Denied 377 U.S. 976.

Indeed, citing *United States* v. *Hodgson,* 492 F.2d 1175 (10th Cir., 1974) as authority that Walsh must establish the privilege and its protections while on the stand is misplaced. *Hodgson* was a revenue enforcement proceeding, not a secret grand jury proceeding. Furthermore, Hodgson did nothing at the enforcement proceeding hearing to establish the privilege asserted, whereas Walsh pleaded the existence of the privilege and would have produced the proof had it been necessary. But more importantly Walsh, unlike Hodgson, represents his client in the very matter

under investigation and in which investigation his client has elected to rely on his Fifth Amendment rights.

The Opinion also raises the question of "[a]n enormous potential for conflict of interest". This comment is made in a factual vacuum. It is possible the Court is unaware of the facts surrounding Walsh's multiple representation. Walsh represented five members of the Accardo family and "Michael Volpe, a handyman for Accardo". (Opinion p. 2, R-6). Walsh accompanied each of his clients when they appeared before the grand jury. Volpe appeared on September 13, 1978 at about 10:30 a.m. Mr. Accardo appeared on the same day shortly thereafter at about 11:15 a.m. (R-6, p. 3). Thus, whatever conflict may exist was known to the government on September 13, 1978, and yet it is undisputed no mention of any conflict was ever suggested. In fact, the government continued to contact Walsh concerning the subsequent appearances of other Accardo family members. (R-6, p. 3) Thus, the government can be said to have acquiesced and encouraged any conflict which may exist. It would be unfair for the government to now capitalize on an occurrence which they fostered.

Perhaps the attitude of the government at the time reflects the comments by Professor Wigmore:

> "When the same attorney acts for two parties having a common interest, and each party communicates with him . . . the communications are clearly privileged from disclosure at the instance of a third person." 8 Wigmore, *Evidence* (McNaughton Rev. 1961) Sec. 2312, p. 603.

Contrary to the intimation of the Court's Opinion, two or more persons having a joint interest may jointly consult with an attorney and the consultation or joint communications do not lose their confidentiality to the outside world. *McCormick on Evidence*, Section 19, p. 189. The

Court's comments regarding the "potential for conflict of interest" are really unfair since the potential results more from the government's failure to bring the potential to Walsh's attention. There can be *no doubt* the prosecutors were in a much better position to realize the problem than Walsh. Remember, Walsh does not know what Volpe, Accardo, or any other witness told the grand jury. Remember, the government encouraged the multiple representation when it called Walsh to arrange the appearance of the other Accardo family members. (R-6, p. 3). Also, whatever problem the *now* conflict of interest may create, if it exists, it cannot affect the past relationship of Walsh and his clients and their confidential communications. Even assuming Walsh had a joint communication with Accardo and Volpe, the confidentiality of the joint communication remains. *Matter of Grand Jury Subpoenas Duces Tecum*, 406 F.Supp. 381 (S.D.N.Y., 1975).

Also ignored by the Seventh Circuit's opinion is the effect of the Work Product Doctrine and the protection it provides. The questions proposed by the government clearly intrude upon Walsh's efforts to represent his clients. As noted by the Sixth Circuit's opinion in *In Re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 935 (6th Cir., 1980):

> "Work product consists of the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions."

The Work Product Doctrine, as well as the privilege, creates a zone of privacy in which the attorney can work free from government intrusion.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari be granted.

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 77 GJ 2144

IN RE SPECIAL SEPTEMBER 1978 GRAND JURY

MEMORANDUM OPINION AND ORDER

Following upon my announcement of the foregoing opinion, the Government submitted to me *in camera* the affidavit of one of the organized crime strike force prosecutors in this case, stating why his office believed Mr. Walsh's testimony to be necessary to the Grand Jury's investigation. The government also submitted a list of 73 questions which it proposes to ask Mr. Walsh, should he be ordered to appear.

The affidavit sought to demonstrate the particularized need for Mr. Walsh's testimony. Since the affidavit details the course of the Strike Force's investigation I will not disclose its specific contents. However, in substance, it states the facts which lead the Government to conclude that Michael Volpe has been abducted, killed, or otherwise caused permanently to disappear and the steps taken thus far to discover the motive and identity of the person or persons who may have been responsible. The affidavit

expresses the belief that Mr. Walsh possesses information relevant to this matter and asserts that all other known sources of information have been exhausted.

I am of the opinion that the statements contained in the affidavit are insufficient to warrant the intrusion into the attorney-client relationship which would result from Mr. Walsh's appearance before the grand jury. The affidavit discloses no fact from which it reasonably might be assumed that Mr. Walsh actually does possess information pertaining to Mr. Volpe's disappearance or present whereabouts, nor does it show that the public's welfare in having Mr. Walsh's testimony before the Grand Jury outweighs the constitutionally recognized value to the public of our maintaining stability in the attorney-client relationship.

Over and above the Government's establishing a particularized need for Mr. Walsh's testimony, as earlier I indicated, there still remains the Government's obligation in this type of matter to establish that the information sought is not of a privileged nature. With relation to this issue, it is important to note that Mr. Walsh not only was and presumably remains the attorney for Mr. Volpe, but also was and still is the attorney for Mr. Accardo.

Many of the questions proposed by the Government, each standing alone, appear not to invade an attorney-client privilege or the attorney work product exemption from disclosure, but, that which the Government seeks not to do directly would nevertheless be accomplished when the questions are asked in groups or considered as a whole. What we have is a series of questions which form webs from which inferences both in the questions and the answers arise to violate the privilege or the right of exemption. The cumulative effect of the whole of the questions must be considered.

A similar situation was considered by the Fifth Circuit in *In re Grand Jury Proceedings* (Jones), 517 F.2d 666 (5th Cir. 1975). In *Jones,* several attorneys were subpoenaed to appear before a Federal grand jury investigating possible narcotics and income tax violations. The attorneys were asked to testify and produce records of retainer agreements and fees received on behalf of specified clients of theirs. These clients recently had been arrested, indicted, or convicted of drug offenses. Specifically, the prosecutors were seeking the disclosure of the identities of any unnamed third parties who may have retained these counsel and paid their fees on behalf of their known clients. Recognizing that Courts had held that the fact of retention, the identity of a client, and information relating to the payment of fees could not be withheld on the basis of an attorney-client privilege, the Fifth Circuit concluded that this type of case fell within an exception. Because disclosure of this information, combined with the information already known to the Government, would tend to connect the unnamed clients to inculpatory conduct and because the information was communicated by them to their attorney with an expectation of confidentiality, the Fifth Circuit concluded that the protection of the attorney-client privilege even as to these matters was warranted. 517 F.2d at 674. *See also Baird* v. *Koerner,* 279 F.2d 623, 633 (9th Cir. 1960).

Since the Government's proposed questions in the instant matter, unlike the affidavit, were made available to the defense, they can be discussed in some detail. Questions 1-6 are merely introductory, establishing the identity and occupation of the witness. Questions 7-26 delve into Mr. Walsh's representation of Mr. Volpe. Specifically, the Government wishes to inquire into the amounts received for such representation, the manner of payment,

and whether the payments were made by Mr. Volpe. By these questions, the Government might be able to establish that the fees were not paid by Mr. Volpe, an unemployed handyman, but rather, presumably, by Mr. Accardo. This could create the inference that Mr. Volpe's benefactor was interested in controlling his testimony. It could easily follow that Mr. Accardo had a motive for causing Mr. Volpe's disappearance to prevent any further testimony by him. As was stated in *Jones*, "[t]he attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the clients' identities when such protection is necessary in order to preserve the privileged motive." 517 F.2d at 674.

The next series of questions, 27-46, deal with meetings between Mr. Walsh and Mr. Volpe prior to and including the date of his appearance before the grand jury. These questions inquire into the times of their meetings, the identities of any third parties who may have been present and the circumstances, though not the substance, of the conversations. As with the preceding series of questions disclosing or declining to disclose the identities of other participants in the conversations could create inferences that invade the attorney-client privilege.

The last set of questions, 47-73, seek to reveal the surrounding circumstances, though not the substance, of any meetings or communications between Mr. Walsh and Mr. Volpe and any efforts made by Mr. Walsh or others to contact Mr. Volpe subsequent to his grand jury appearance. Once again, these questions taken as a whole, whether answered or not, would raise inferences invading the attorney-client relationship between Mr. Walsh and either Mr. Volpe or Mr. Accardo or both.

In view of the foregoing I must conclude that the Government has also been unable to establish that the attorney-client privilege would not be injured by the appearance of Mr. Walsh before the grand jury. In addition, were Mr. Walsh to respond to some of the proposed questions but not to others, it is quite likely that he would waive part if not all of his right not to disclose his work product, much as an individual's fifth amendment rights can be lost when not timely asserted.

Accordingly, I find that the Government in its recent submissions to me has not met the burden it must bear before it may place before the grand jury the testimony of the attorney for its other witnesses. It is true that because of the unique circumstances of this matter, the obstacles which necessarily had to be placed before the Government may here prove to be insurmountable; but the sanctity of the attorney-client relationship is not to be lost merely because the Government may be left without some other recourse.

The Government's petition for a Rule to show Cause why Mr. Walsh should now be held in contempt must be and the same hereby is denied; and the *subpoenaes duces tecum* and *ad testificandum* served upon him are quashed.

ENTER:

James B. Parsons

JAMES B. PARSONS

United States District Judge

OCTOBER 11, 1979

APPENDIX "A-1"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE SPECIAL SEPTEMBER 1978)
GRAND JURY) No. 77 GJ 2144

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on a petition by the United States for a Rule to Show Cause why Carl M. Walsh should not be held in contempt of court. Mr. Walsh, an attorney, was served with subpoenaes *ad testificandum* and *duces tecum* requiring him to appear before the Special September 1978 Grand Jury to give testimony and produce documents pertaining to one of his clients, Michael J. Volpe.

The Special September 1978 Grand Jury has been investigating the possible violation of Federal criminal laws stemming from the burglary of the residence of Anthony J. Accardo and the subsequent murders of five Chicago area burglars. Mr. Accardo, members of his immediate family and Mr. Volpe were among the witnesses called to appear pursuant to this investigation. These parties are all clients of Mr. Walsh and were represented by him when they appeared before the grand jury. Mr. Accardo is a target of the investigation.

Subsequent to his appearance before the grand jury Mr. Volpe disappeared. The grand jury is now also investigating possible violations of 18 U.S.C. §§ 1503 and 1962 concerning obstruction of justice by causing the abduc-

tion or disappearance of a grand jury witness and conducting an illegal enterprise through a pattern of racketeering activity, respectively. Mr. Accardo is also a target in these investigations. Mr. Walsh has been subpoenaed to disclose any knowledge or information he may have regarding Mr. Volpe's present whereabouts.

Mr. Walsh filed a motion to quash these subpoenaes, arguing that because one of his clients was a subject of the grand jury investigation, his mere appearance before the same grand jury in secret proceedings, even if only to assert valid privileges, would have a "chilling effect" on the attorney-client relationship. I denied the motion and ordered Mr. Walsh to appear. *In re Carl M. Walsh, a Witness Before the Special September 1978 Grand Jury*, 77 GJ 2144 (N.D. Ill. July 9, 1979). I declined at that time to address arguments pertaining to the attorney-client privilege or attorney work product exemption from disclosure in this context on the grounds that, as Mr. Walsh had not appeared before the grand jury to assert the privilege or exemption, these issues were raised prematurely. Mr. Walsh presented himself in the grand jury's witness room but refused to appear before that body as ordered. The motion now before me was filed by the Government later that same day. Upon reconsideration, I am of the opinion that the importance of the attorney-client relationship to the administration of justice and the potential dangers to that relationship posed by the practice of calling an attorney to appear before the same grand jury which is investigating his or her client requires a careful inquiry into the applicability of those rights in this limited context.

The most often repeated statement of the scope of the attorney client privilege comes from Dean Wigmore who states it as:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 Wigmore §2292 (McNaughton Ed. 1961) *cited in Radiant Burners, Inc.* v. *American Gas Assn.*, 320 F.2d 314, 319 (7th Cir. 1963) *cert. denied* 375 U.S. 929 (1963). However, this is only a basic statement of the definition, the application of which varies according to the particular facts and circumstances of each individual case. And because the privilege necessarily has the effect of withholding relevant information from the fact finder it is only allowed to the extent necessary to satisfy its underlying purpose. That purpose is to facilitate the workings of justice by encouraging a client to make full disclosure to his attorney because "as a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *U.S.*, 425 U.S. 391, 403 (1976). *See also U.S.* v. *Moll*, No. 79-1007 (7th Cir. July 13, 1979) (slip opinion); *Radiant Burners, supra.* Thus it is apparent that the rationale behind the privilege can be traced to the critical role of the attorney-client relationship in the American legal system and the trust and confidence which must exist between the client and his lawyer in order to preserve their relationship.

The attorney work product exemption had its genesis in the context of civil discovery in the landmark case of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). This doctrine

has developed in civil matters to provide almost absolute immunity to a lawyer's theories, mental impressions, litigation strategy, etc.—opinion work product—and to require a showing of substantial need before production of documents or other tangibles prepared or collected by a lawyer in anticipation of litigation—ordinary work product—may be compelled by an opposing litigant. *See* F.R.C.P. 26(b)(3). This concept seeks to promote the policy that cooperation and the exchange of information between civil litigants furthers judicial efficiency while at the same time respecting a privacy interest of the attorney in his work and the adversary system of litigation.

However, in the context of criminal and grand jury proceedings, recognition of the work product exemption rests upon policy considerations derived from the Fifth and Sixth Amendments to the United States Constitution. *See U.S.* v. *Nobles,* 422 U.S. 225 (1975); *In re Grand Jury Proceedings,* 473 F.2d 840 (8th Cir. 1973); *In re Terkeltaub,* 256 F.Supp. 683 (S.D. N.Y. 1966). And, as will be more fully discussed shortly, the Fifth and Sixth Amendments are implicit and explicit testimonials to the indispensible role of the lawyer in our system of justice in protecting the rights of the individual. The benefits of the lawyers' efforts inure not only to his client but to society as a whole. Thus, as with the attorney-client privilege, the attorney work product exemption in a grand jury context reflects the *deference given the* attorney-client relationship.[1]

The importance of the lawyer to the administration of justice was underscored by the framers of the Constitution in adopting the Fifth and Sixth Amendments. The Su-

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[1] For a fuller discussion of the historical development of the common law and statutory protections to this relationship see my opinion in *In re The Special September 1978 Grand Jury,* 76 GJ 560 (N.D. Ill. January 24, 1979).

preme Court has often recognized in interpreting these amendments that "the right to aid of counsel is of [a] fundamental character." *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932).[2]

The Court has further stated that the assistance of counsel:

> is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty . . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'. *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938). To the same effect see *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Smith* v. *O'Grady*, 312 U.S. 329 (1941).

Gideon v. *Wainwright*, 372 U.S. 335, 343 (1963). *See also Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Carnley* v. *Cochran*, 369 U.S. 506 (1962). Only recently the Supreme Court repeated this principle stating "the lawyer occupies a critical position in our legal system . . . . Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person." *Fare* v. *Michael C.*, ... U.S. ....., No. 78-334 (slip op. June 20, 1979).

Because the law touches upon nearly all aspects of everyday modern life, society's need for the advice of lawyers is greater than ever before. And although many of the services provided by a lawyer are not of the same magni-

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[2] The Grand Jury is not so fundamentally endowed. As a shield against an improper indictment it shares the Fifth Amendment. Its powers as an investigative body and the strength of its subpoena power rest solely upon decisional and statutory interpretations of the common law.

tude as representation of a criminal defendant, they are nonetheless so vital to the orderly functioning of society that they command great deference and respect. Accordingly, any intrusion into the attorney-client relationship, whether major or trivial, must be examined with a critical eye to insure that the relationship is given the protection it warrants under the circumstances.

The practice of subpoenaing an attorney before the same grand jury which is investigating his or her client has been characterized as "disturbing" and "dangerous" by several courts. *See, e.g., U.S.* v. *Wolfson,* 558 F.2d 59 (2d Cir. 1977); *U.S.* v. *Colacurcio,* 499 F.2d 1401 (9th Cir. 1974); *In re Grand Jury Proceedings,* 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation,* 412 F.Supp. 943 (E.D. Pa. 1976); *In re Terkeltaub,* 256 F.Supp. 683 (S.D. N.Y. 1966). In *Terkeltaub,* the leading case in this area, Judge Frankel held that Fifth and Sixth Amendment implications required recognition of the attorney work product exemption from disclosure in grand jury proceedings. Although in *Terkeltaub* the lawyer/witness did appear before the grand jury to assert the exemption, rather than refusing to appear at all as in the instant matter, Judge Frankel's analysis and reasoning is equally pertinent here and bears repeating:

> On the one hand, there is the heavy weight of history and public need commanding that the grand jury's investigations be as unfettered as possible. See, e.g., United States v. Thompson, 251 U.S. 407, 413-415, 40 S. Ct. 289, 64 L. Ed. 333 (1920). And the Government comes here with the laudable purpose of guarding against suspected attacks on the integrity of the judicial process itself. Cf. Massiah v. United States, 377 U.S. 201, 207, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); Caldwell v. United States, 92 U.S. App. D.C. 355, 205, F. 2d 879, 881 (1953) Cert. denied, 349 U.S.

930, 75 S. Ct. 773, 99 L. Ed. 1260 (1955). On the other hand, the disclosures now demanded, touch a vital center in the administration of criminal justice, the lawyer's work in investigating and preparing the defense of a criminal charge. Appraising these interests in the circumstances now presented, the court concludes that the attorney was not only entitled, but probably required, to withhold answers to the grand jury's questions.

In explaining this conclusion, it bears emphasis that while the witness before us is a lawyer, the crucial interests at stake belong to the whole community. As a seasoned trial lawyer and Justice said 'it too often is overlooked that the lawyer and law office are indispensable parts of our administration of justice. . . . The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of a practice impairing the lawyer's effective representation of his client. Hickman v. Taylor, supra, 329 U.S. [495] at 514-515, 67 S. Ct. [3852] at 395, (Jackson, J., concurring). . . . .

And so we start here with a demand that is troublesome on its face—a demand that a lawyer be forced to testify about his work in supposed defense of a client. Our problem is not solved, but it is affected, by a recognition that this sort of procedure must have at least a slightly chilling impact upon counsel for defendants in criminal cases. Again, this has nothing to do with whether lawyers for their own sakes should be treated better or worse than other people. It has to do with how the public may fare . . . .

256 F. Supp. at 684-686 (footnotes omitted).

Thus, it can be seen that this practice requires a balancing of the detriment to society resulting from the loss of a grand jury indictment against the loss society suffers from an intrusion into the attorney-client relationship. I am of the opinion that the attorney-client relationship carries the greater weight and requires more protection

under these circumstances than is offered by the attorney client privilege and attorney work product exemption from disclosure. These measures are deficient in that they only become operative after the lawyer makes an appearance before the grand jury in secret proceedings. As stated by Judge Becker in *In re Grand Jury Investigation, supra,* at 945-46:

> This practice permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyers unfettered devotion to the clients interest and thus impair, or at least impinge upon, the attorney client relationship.

Accord, U. S. v. *Wolfson, supra; U. S.* v. *Colacurcio, supra; In re Grand Jury Proceedings, supra.* In view of the foregoing, I conclude that under these circumstances, the attorney-client relationship warrants stronger safeguards than are currently recognized.

I realize that the grand jury has a right to every persons unprivileged and relevant information, *see, e.g., U. S.* v. *Calandra,* 414 U.S. 338 (1974); *Branzburg* v. *Hayes,* 408 U.S. 665 (1972); *U.S.* v. *Bryan,* 339 U.S. 323 (1950); *Blackmer* v. *U.S.,* 284 U.S. 421 (1932); *Blair* v. *U.S.,* 250 U.S. 273 (1919), but its subpoena power "is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Calandra, supra,* at 346. I do not mean to suggest that a lawyer in this situation should have a carte blanche right to refuse to appear. I believe that the character of the attorney-client relationship and the dangers posed by this

practice require the Government to justify the intrusion upon the filing of a motion to quash its subpoena on the grounds that privileged information or exempt materials are demanded.

The attorney/witness need not appear before the grand jury before these rights may be asserted nor should he bear the burden of sustaining them. Rather, once the attorney-client relationship is established, the Government must be prepared to establish on behalf of the grand jury that: (1) the information and materials demanded by the subpoena are not within the ambit of the attorney-client privilege or the attorney work product exemption from disclosure, and (2) that there is a particularized need for the information or materials sought, that no other sources for such information are known or available, and that the information or materials sought are material to the investigation.

The easier case is that involving a subpoena *duces tecum*. When it is clear from the face of the subpoena that it does not call for the production of privileged information or exempt materials, the government, of course, would not be required to show the non-privileged nature of the materials sought. In this situation the court would be interested only in why the attorney's appearance before the grand jury is necessary. If, however, it is not clear from the language of the subpoena *duces tecum* whether or not the materials called for are privileged, the government must establish also that what is sought is not privileged.

A more difficult problem is presented by the subpoena *ad testificandum* which, unlike the subpoena *duces tecum*, usually is not limited in scope on its face. Very often, for example, the answer to a question which does not violate

a privilege or invade an exempt area of inquiry will inescapably lay the groundwork for such an intrusion. For this reason, I conclude that whenever a subpoena *ad testificandum* is served upon and challenged by an attorney under these circumstances, the Government must submit to the court for *in camera* examination a list of proposed questions and areas of inquiry to which the attorney/witness will be asked to respond. This submission should be specific and detailed so as to enable the court to make a determination as to whether and to what extent the subpoena should be enforced.

The effect of this decision is not to make it difficult for the Government to unearth the facts of a crime in which the attorney is a participant or concerning which he acts in obstruction of justice. In such instances he must disclose all knowledge or information in his possession concerning the matter, subject, of course, to his personal right not to incriminate himself. Buch such is not the case here where the Government takes the position that Mr. Walsh is not himself suspected of involvement in any crime.

ENTER:

/s/ *James B. Parsons*
JAMES B. PARSONS
United States District Judge

Dated: July 24, 1979

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2340

IN THE MATTER OF CARL WALSH, A WITNESS BEFORE THE SPECIAL SEPTEMBER 1978 GRAND JURY.

APPEAL OF: UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 GJ 2144—**James B. Parsons**, *Judge*.

ARGUED FEBRUARY 20, 1980—DECIDED MAY 19, 1980

Before FAIRCHILD, *Chief Judge*, BAUER and CUDAHY, *Circuit Judges*.

BAUER, *Circuit Judge*. The United States appeals a ruling of the district court denying its petition for a Rule to show cause why attorney Carl Walsh should not be held in contempt for refusing to testify before a grand jury and produce records. The district court quashed the subpoenas *duces tecum* and *ad testificandum* on the ground that compliance would violate the attorney-client privilege. We reverse and remand.

I

This proceeding is another phase in the intrigue surrounding the burglary of the residence of Anthony J. Accardo. As reported in an earlier decision, "some time after the burglary—shortly thereafter, as a matter of fact—various people described by the government as

'known burglars' began showing up dead, none from natural causes, in the Chicago Metropolitan area." *United States v. One Residence and Attached Garage, etc.*, 603 F.2d 1231, 1232 (7th Cir. 1979).

A grand jury has been investigating possible federal criminal violations stemming from these events. Accardo family members and Michael Volpe, a handyman for Accardo who discovered the burglary, appeared before the grand jury, represented by appellee Carl M. Walsh.

The plot thickened when, sometime after Mr. Volpe's appearance before the grand jury, "he left his home for his usual place of employment—the Accardo residence—and seemingly disappeared from human knowledge." *Id.* at 1233. The grand jury then began investigating Volpe's disappearance. The attorney Walsh, believed to be one of the last persons to have seen Volpe, was subpoenaed. The subpoena[1] required Walsh to appear and testify and to produce:

1. Accounts receivable relating to Michael Joseph Volpe, Sr., including ledgers.
2. Time records which describe the amount of time spent by Carl M. Walsh in performing services for Michael Joseph Volpe, Sr.
3. Any and all entries in records, including but not limited to file memoranda, appointment books and calendars for the period from September 8, 1978 to October 31, 1978, which memorialize the date, place, and time of meetings and/or communications between Michael Joseph Volpe, and Carl M. Walsh and Carl M. Walsh's office employees.
4. Copies of all statements, bills, receipts and payments made by and for Michael Joseph Volpe, Sr. relating to attorney services.

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[1] The original subpoena sought Walsh's "fingerprints, palmprints [and] photograph." The government withdrew that subpoena on July 24, 1979 and substituted the current subpoena.

5. Retainer contracts, letters of understanding and letters of agreement for Michael Joseph Volpe, Sr. relating to the creation and continuation of an attorney-client relationship.

Walsh's motion to quash was denied and he was ordered to appear before the grand jury on July 11, 1979. Walsh came to the grand jury room on that date but refused to enter the room. The Government filed a motion for a rule to show case why Walsh should not be held in contempt. In ruling on that motion, Judge Parsons held that before an attorney could be required to appear before a grand jury at which his client has already testified, the Government must submit a list of proposed questions for *in camera* review and must establish:

> (1) that the information and materials demanded by the subpoena are not within the ambit of the attorney-client privilege or the attorney work product exemption from disclosure, and (2) that there is a particularized need for the information or materials sought, that no other sources for such information are known or available, and that the information or materials sought are material to the investigation.

The Government submitted to the court an affidavit establishing the need for information from Walsh and a list of 73 proposed questions it intended to ask him. Without requiring Walsh to take the stand, the district court ruled that the "cumulative effect" of the proposed questions violated the attorney-client privilege. The court quashed the subpoenas and denied the Government's contempt motion. The Government appeals under 18 U.S.C. § 3731.[2]

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[2] Walsh contends that the Government's appeal is barred because he was tried for criminal, not civil contempt. But none of the notices in the show cause proceeding stated that the action was one for criminal contempt as required by Fed. R. Crim. P. 42(b). The purpose of the proceedings below was to force Walsh to testify and produce records, not to punish him for his past failure to appear. *Pabst Brewing Co. v. Brewery*

(Footnote continued on following page)

II.

The first issue here is whether the attorney-client privilege insulates an attorney from having to appear before a grand jury investigating events which may implicate his clients. The grand jury, fundamental to our criminal justice system, performs "the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972). In pursuing its goal, the grand jury exercises broad investigatory powers subject to the supervision of a judge.

In contrast stands the attorney-client privilege. The attorney-client privilege protects from disclosure confidential communications made by a client to his attorney. The privilege was developed to promote free consultation of legal advisors by clients. *In re January 1976 Grand Jury (Genson)*, 534 F.2d 719 (7th Cir. 1976). In *Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314, 319 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963), this Circuit adopted the Wigmore formulation of the privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 Wigmore, Evidence § 2292 at 554 (McNaughton rev. 1961).

To reconcile the competing values served by the privilege and the grand jury, the privilege must be up-

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[2] *continued*
Workers Local Union No. 77, 555 F.2d 146, 149 (7th Cir. 1977); *F.T.C. v. Gladstone*, 450 F.2d 913 (5th Cir. 1971). Walsh indicated no doubt that the nature of the proceeding was civil. *United States v. Joyce*, 498 F.2d 592, 595 (7th Cir. 1974). The Government's appeal is therefore no violation of the double jeopardy clause of the Constitution and is permissible under 18 U.S.C. § 3731.

held only in those circumstances for which it was created. *Fisher v. United States*, 425 U.S. 391 (1976). As it is in derogation of the search for truth, the privilege must not be lightly created nor expansively construed. *United States v. Nixon*, 418 U.S. 683, 710 (1974). No privilege, no matter how central to our system of justice, has been held to excuse the "obligation of every person to appear and give his evidence before the grand jury." *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). Instead, the interest in preserving confidences and the interest in pursuing the public's right to "every man's evidence" are accommodated. To that end, the witness must take the stand and answer or refuse to answer individual questions. *Cf. Branzburg v. Hayes; Fisher v. United States.*

Walsh asserts that the attorney-client relationship will be endangered if he is compelled to testify. But the privilege protects confidential communications, not the attorney-client relationship as a whole. We do not denigrate the attorney-client privilege nor do we elevate the prerogatives of the grand jury. But were we to afford attorneys the right to refuse to appear before grand juries, we would be granting a protection far greater than the parameters of the privilege.

The district court ruled that the government could not question Walsh unless it established (1) that the materials and information sought were not covered by the attorney-client privilege and (2) that there was a particularized need for the information or materials sought, that no other sources for such information were known or available, and that the information or materials sought were material to the investigation. These restrictions, available to no other grand jury witness, are not a permissible method of accommodating the privilege to the grand jury. First, the burden of establishing the existence of a privilege rests on the party asserting it. *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469 (3d Cir. 1979); *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975). Second, since there is no privilege to refuse to appear before the grand jury, there can be no privilege

to refuse to appear before the grand jury until the government demonstrates some compelling need for the counsel's testimony. *See Branzburg v. Hayes*, 408 U.S. at 708.

Walsh must take the stand without previous restrictions by the district court.[3] He may, of course, initially refuse to answer questions he believes to be protected by the attorney-client privilege. But a general refusal to cooperate or the mere assertion of the privilege is not enough. *See Hoffman v. United States*, 341 U.S. 479 (1951). Walsh must establish the elements of the privilege as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

Before he can even claim the privilege, the attorney-witness must establish the fact of an attorney-client relationship. That task is complicated by Walsh's representation of both Accardo and Volpe. An enormous potential for conflict of interest is generated by Walsh's multiple representation of clients before the grand jury. *See In re Investigation Before the April 1975 Grand Jury (Rosen)*, 531 F.2d 600 (D.C. Cir. 1976).[4] Since the privilege belongs to the client, Walsh must first establish the existence of an attorney-client relationship between himself and Accardo or Volpe. He must then identify on whose behalf he asserts the privilege. *See, e.g., United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973) (attorney must state for which client work was done).

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[3] Of course, the presiding judge maintains supervision as to the propriety, purposes and scope of the grand jury inquiry and the pertinence of the probable testimony. *Branzburg v. Hayes*, 408 U.S. at 709.

[4] If the Government believes that Walsh's representation of all the witnesses presents a potential conflict of interest, it can seek to disqualify him. *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978); *In re Grand Jury Proceedings*, 428 F. Supp. 273 (E.D. Mich. 1976). Such disqualification, however, would not affect the application of the attorney-client privilege here. *See United States v. Gaines*, 529 F.2d 1038, 1042 (7th Cir. 1976).

To determine the existence of the attorney-client relationship, Walsh may be questioned as to the number of years during which the alleged relationship continued and the general nature of the legal services rendered. Business or other advice is not privileged, and should be distinguished from professional legal services. Such general inquiry will aid in identifying which areas may be pursued and which are protected. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *see In re Kinoy*, 326 F. Supp. 400 (S.D.N.Y. 1970).

Once the attorney-client relationship is established, inquiry will focus upon the nature of the communication or information sought. The relationship itself does not create "a cloak of protection [which is] draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client." *United States v. Goldfarb*, 328 F.2d 280, 281-82 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. at 403. Walsh must therefore establish that each question he challenges involves a communication made in confidence.[5]

Some areas of inquiry have been held not privileged because they are not communications or are not confidential. For example, the fact of communication between a known client and his attorney is not a privileged communication. *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964). Attorneys may be questioned as to their clients' whereabouts and whether they

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[5] The proper procedure by which to determine the existence of the privilege is left to the trial court. We have approved the use of an *in camera* proceeding when the underlying facts demonstrating the existence of the privilege may be presented only by revealing the very information sought to be protected by the privilege. *United States v. Tratner*, 511 F.2d at 252; *see also In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d at 474; *United States v. Johnson*, 465 F.2d 793 (5th Cir. 1972).

have had contact with them. *In re Grand Jury Subpoenas Served upon Field*, 408 F. Supp. 1169 (S.D.N.Y. 1976).

> Excluded from the privilege, also, are physical characteristics of the client, such as his complexion, his demeanor, . . . and his dress. Such things are observable by anyone who talked with the client, and there is nothing, in the usual case, to suggest that the client intends his attorney's observations of such matters to be confidential.

United States v. Kendrick, 331 F.2d at 113-14. *Accord*, *Howell v. United States*, 442 F.2d 265 (7th Cir. 1971).

As a general rule, matters involving the receipt of fees from a client are not privileged as they do not involve confidential communications. *In re January 1976 Grand Jury (Genson)*; *United States v. Hodgson*; *Unites States v. Haddad*, 527 F.2d 537 (6th Cir. 1975), *cert. denied*, 425 U.S. 974 (1976). This is also true with respect to who paid the fee. *In re Michaelson*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). The grand jury may thus view the documents sought by the subpoena, including ledgers, bills, time records, and retainer agreements. *See, e.g., United States v. Cromer*, 483 F.2d at 101.[6]

In re Grand Jury Proceedings (Lawson), 600 F.2d 215 (9th Cir. 1979), recognized that non-privileged matters will be protected when an attorney can show that a strong probability exists that disclosure of information would implicate the client in the very criminal activity for which legal advice was sought. Even then, however.

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[6] An exception to the non-privileged status of retainer agreements exists where the payor client is unknown. This does not appear applicable to the record before us as Walsh's clients are admitted. *See, e.g., Tillotston v. Boughner*, 350 F.2d 63 (7th Cir. 1965); *see also N.L.R.B. v. Harvey*, 349 F.2d 900 (4th Cir. 1965) (client's identity will be protected when so much of the substance of the communication is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions).

the information must be disclosed if the government makes a prima facie case that the attorney was retained in order to promote intended or continuing criminal activity. *United States v. Billingsley*, 440 F.2d 823, 827 (7th Cir.), *cert. denied*, 403 U.S. 909 (1971). As stated in *United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977), "the attorney-client privilege is not to be used as a cloak for illegal or fraudulent behavior." *Accord*, *In re Grand Jury Subpoena Served upon David Doe*, 551 F.2d 899 (2d Cir. 1977); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979). It lies in the sound discretion of the trial judge to determine whether the Government makes a prima facie showing. *In re Special September 1978 Grand Jury (II)*, No. 79-1218, slip op. at 10 (7th Cir. Ap. 30, 1980); *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir. 1976).

Walsh is also required to testify concerning meetings at which third parties were present. *United States v. Pipkins*, 528 F.2d 559 (5th Cir. 1976). The attorney-client privilege does not protect such conversations with non-clients. 8 Wigmore, Evidence § 2311 at 601-602 (McNaughton rev. 1961). Walsh may be questioned about the fact of any such meeting, the place, its duration, its initiation, its purpose, and the contents of the conversation which took place. *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966). Walsh must testify as to information received from a third party about his clients. *In re Fischel*, 557 F.2d 209 (9th Cir. 1977).

Walsh may also be asked if he told Volpe he had a duty to reappear before the grand jury if called. In similar cases, attorneys have been required to answer whether they informed their clients that they must appear on a particular date for trial or sentencing. *United States v. Freeman*, 519 F.2d 67 (9th Cir. 1975); *In re Grand Jury Proceedings, Des Moines, Iowa*, 568 F.2d 555 (8th Cir. 1977), *cert. denied*, 435 U.S. 999 (1978).

We are cognizant of the dangers presented when attorneys are called before the grand jury, *see In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa. 1976), and are aware that a *Lawson*-type situation may

preclude discovery of otherwise non-privileged information. *See, e.g., In re Grand Jury Subpoenas Served upon Field*, 408 F. Supp. at 1173 (address privileged when lawyer gave legal advice concerning change of residence). Because of the district court's actions, however, Walsh was never required to prove the existence of the privilege or any exceptions to the non-privileged status of other information. We presume that Walsh is competent to protect his clients' confidential interests before the grand jury, *United States v. Wolfson*, 558 F.2d 59, 66 (2d Cir. 1977), and that he will cooperate on remand to the full extent of his professional obligations. Walsh must appear and testify. He will, on remand, have the opportunity to establish the applicability of the privilege to specific questions challenged.

We reverse the judgment of the district court quashing the subpoenas and denying the Rule to show cause. We remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "C"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 31, 1980.

Before

Hon. THOMAS E. FAIRCHILD, Chief Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

IN THE MATTER OF CARL WALSH, A WITNESS BEFORE THE SPECIAL SEPTEMBER 1978 GRAND JURY.
No. 79-2340

APPEAL OF: UNITED STATES OF AMERICA

On Petition for Rehearing and Suggestion for Rehearing in banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by Witness-Appellee Carl Walsh, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX "D"

EXHIBIT 1

1. What is your name?
2. What is your occupation?
3. What is your business address?
4. How long have you been engaged in the practice of law?
5. Are you a member of any bar associations?
6. Which ones?
7. Show him a picture of Michael Joseph Volpe, Sr. Have you ever met this individual?
8. When did you meet him?
9. Where did you meet him?
10. Who was present?
11. Have you represented him as a client?
12. In what jurisdiction, have you represented him?
13. In what general type of matter have you represented him?
14. Did you represent him during his grand jury appearance on September 13, 1978?
15. Were you paid for representing Michael Joseph Volpe, Sr.?
16. When were you paid?
17. How much were you paid?
18. Did Mr. Volpe, Sr. pay you?
19. Were you paid by cash or by check?

20. Did you have a fee arrangement with Michael Joseph Volpe, Sr.?
21. What was the fee arrangement that you had with him?
22. Were you paid a retainer for representing Michael Joseph Volpe, Sr.?
23. When were you paid a retainer?
24. How much were you paid?
25. Did Michael Joseph Volpe, Sr. pay the retainer?
26. Were you paid by cash or by check?
27. Other than on September 13, 1978, on what dates have you seen Michael Joseph Volpe, Sr.?
28. Where have you seen him?
29. When did you see him?
30. Who was present?
31. On September 13, 1978, did you meet with Michael J. Volpe, Sr. before his grand jury appearance?
32. When did you meet him?
33. Where did you meet him?
34. Who was present?
35. On September 13, 1978, during Michael Volpe's grand jury appearance, were you in the witness room which is directly outside the grand jury room?
36. Did you remain there during his grand jury appearance?
37. On September 13, 1978, did you see Michael Joseph Volpe, Sr. after his grand jury appearance.

38. Where did you see him?
39. When did you seen him?
40. Who was present?
41. For what period of time did you see him?
42. At that time, did you have any discussions with him?
43. Where did you have this discussion?
44. When did you have the discussion?
45. Who was present during this discussion?
46. If anyone else was present, what, if any, relationship did you have with that person?
47. After September 13, 1978, when was the next time that you saw Michael Joseph Volpe, Sr.?
48. Where did you see him?
49. When did you see him?
50. Who was present?
51. When was the last time that you talked to Michael Joseph Volpe, Sr.?
52. Where were you when you last talked to him?
53. Where was he when you last talked to him?
54. Have you received any correspondence from Michael Joseph Volpe, Sr.?
55. When did you receive correspondence from him?
56. What, if any, return address was on that correspondence?
57. What, if any, was the date of that correspondence?
58. Have you talked to any members of Michael Joseph Volpe's family?

59. Who have you talked to?

60. When did you talk to that person?

61. Who was present?

62. Where did you talk to that person?

63. The last time that you saw Michael Joseph Volpe, Sr. on ..... 1978, as his attorney, did you advise him that he was under subpoena and had a duty, if called, to reappear before the grand jury?

64. Has Michael Joseph Volpe, Sr. contacted you regarding any reappearance before the grand jury?

65. Do you know where Michael Joseph Volpe, Sr. can be contacted to have him reappear before the grand jury?

66. Have you made any efforts to contact Michael Joseph Volpe, Sr.?

67. Do you know if anyone else has made any efforts to contact Michael Joseph Volpe, Sr.?

68. Have you made any efforts to find Michael Joseph Volpe, Sr.?

69. Have you conducted any investigation to locate Michael Joseph Volpe, Sr.?

70. Have you contacted the police regarding Michael Joseph Volpe, Sr.'s whereabouts?

71. Have you contacted any member of Michael Joseph Volpe, Sr.'s family regarding his whereabouts?

72. Have you contacted anyone about his whereabouts?

73. Describe how Michael Joseph Volpe, Sr. physically appeared on the last day that you saw him?

APPENDIX "E"

SUBPOENA DUCES TECUM GRAND JURY

77 GJ 2144

UNITED STATES DISTRICT COURT

Northern District of Illinois

Special September Session, 1978

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: Carl M. Walsh
39 South LaSalle Street
Chicago, Illinois

GREETING:

YOU ARE HEREBY COMMANDED that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the UNITED STATES DISTRICT COURT for the Northern District of Illinois, in Room 1402, United States Courthouse, in the City of Chicago, in said District, on the 30th day of May, A.D. 1978, at 10:30 o'clock A.M. of said day, and also that you bring with you and produce at the time and place aforesaid:

All original paper writings, records, documents, correspondence, memoranda, contracts and notes in your possession or maintained by you pertaining directly and indirectly to Michael J. Volpe, Sr., (assumed deceased), 6725 West Foster Avenue, Chicago, Illinois, including but not limited to:

1. Records, notes, and memoranda for services rendered from January 1, 1975 to January 1, 1979, for Michael J. Volpe, Sr.

2. Accounts receivable including ledgers for Michael J. Volpe, Sr.

3. Time slips, records, notes for Michael J. Volpe, Sr.

4. Appointment books, calendars, notes, diaries for September 8, 1978 to October 31, 1978.

5. Copies of all statements, bills, receipts and payments made by and for Michael J. Volpe, Sr.

6. Retainer contracts, letters of understanding and letters of agreement for Michael J. Volpe, Sr.

on behalf of the United States, and not depart the Court without leave thereof or of the United States Attorney. And this you shall in nowise omit under the penalty of the law in that case made and provided.

To the Marshal or any other duly authorized officer or agent of the Northern District of Illinois to execute and return in due form of law.

H. STUART CUNNINGHAM
Clerk.

By *Signature Illegible*
Deputy Clerk.

SEAL

S. Gay Hugo
Special Attorney
Chicago Strike Force
(312) 353-5267

Dated: May 18, 1979

APPENDIX "F"

SUBPOENA GRAND JURY

77 GJ 2144

UNITED STATES DISTRICT COURT
Northern District of Illinois

Special September Session, 1978

The President of the United States of America

TO: Carl M. Walsh
39 South LaSalle Street
Chicago, Illinois

The purpose of this subpoena is to obtain your fingerprints, palmprints, photograph, as well as your testimony before the grand jury.

GREETING:

YOU ARE HEREBY COMMANDED that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the United States District Court for the Northern District of Illinois, in Room 1402, United States Court House, at Chicago, in the District aforesaid, on the 30th day of May, A.D. 1979, at 10:30 o'clock A.M., to testify in behalf of the United States generally, and not depart without leave of the Court or of the United States Attorney. And this you shall in nowise omit under the penalty of the law in that case made and provided.

To the Marshal or any other duly authorized officer or agent of the Northern District of Illinois to execute and return in due form of law.

H. STUART CUNNINGHAM
Clerk.

By *Signature Illegible*
Deputy Clerk.

SEAL

S. Gay Hugo
Special Attorney
Chicago Strike Force
(312) 353-5267

Dated: May 18, 1979

United States Department of Justice
CHICAGO STRIKE FORCE
Organized Crime And Racketeering Section
219 South Dearborn Street, Room 1402
Chicago, Illinois 60604

Address Reply
To The Indicated
Special Attorney

312/353-5267

ADVICE OF RIGHTS NOTICE

To insure that all persons who are subpoenaed to appear before the federal grand jury are aware of certain rights which they possess as a witness before a grand jury, the United States Department of Justice has directed that

the following "Advice of Rights Notice" be given to every witness who is served with a subpoena. This notice is not a part of the subpoena, and should not be considered as approved or sanctioned by the United States District Court for the Northern District of Illinois.

1. The grand jury is conducting an investigation of possible violations of Federal criminal laws involving:

   Title 18, United States Code,
   Sections 1962 and 659 and 1503.

2. You may refuse to answer any questions if a truthful answer to the question might tend to incriminate you.

3. Anything that you do say may be used against you by the grand jury or in a subsequent legal proceedings.

4. If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.